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JUNTA REGLAMENTADORA DE TELECOMUNICACIONES DE PUERTO RICO

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Oficina de la Presidenta

August 4, 2011

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: *In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Transfer Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries*, WT Docket No. 11-65

Dear Ms. Dortch:

The Telecommunications Regulatory Board of Puerto Rico ("the Board"), respectfully submits these comments in response to the application filed by AT&T with the Federal Communications Commission ("FCC" or "Commission") on April 21, 2011.<sup>1</sup>

While the impact of AT&T's proposed purchase of T-Mobile from Deutsche Telekom on competition nationwide or in other locales can be debated, there can be no debate that its impact on competition in Puerto Rico will be significant. As shown below, if the transaction is allowed to be completed without any mitigating or ameliorating actions, two carriers will control almost 80% of the Puerto Rico wireless telecommunications market. More disturbing, there is cross-ownership between these two carriers and they have recently been found to have shared competitive data in connection with a proposed transaction. Because the anticompetitive effects of the proposed transaction will be felt, in particular, in Puerto Rico, it is essential that the Commission carefully scrutinize the proposed transaction to mitigate its impacts.

## I. BACKGROUND

As the statutorily-designated agency in charge of regulating telecommunications and information services in Puerto Rico, and with the statutory mandate from the Puerto Rico General Assembly of "ensur[ing] the availability of the broadest range of competitive possibilities in the offering of telecommunications services and facilities"<sup>2</sup> and "promot[ing] competition and us[ing] the market forces as key factors in determining the prices, terms, availability, and conditions of the service,"<sup>3</sup> the Board possesses unique knowledge and has a particular perspective on the proposed AT&T/T-Mobile merger that cannot be offered by any other commentator.

In 1996, recognizing the fundamental changes in telecommunications regulation occurring in the United States, the Puerto Rico General Assembly enacted the Puerto Rico Telecommunications Act to

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<sup>1</sup> *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Transfer Control of the Licenses and Authorizations held by T-Mobile USA, Inc. and its Subsidiaries*, WT Docket No. 11-65 (April 21, 2011).

<sup>2</sup> 27 L.P.R.A. § 265(f).

<sup>3</sup> 27 L.P.R.A. § 265(g).

establish the Board and charge it with protecting the residents of Puerto Rico and ensuring a pro-competitive telecommunications market.<sup>4</sup> Law 213 makes it the public policy to:

- establish specific, predictable, and sufficient support mechanisms to preserve and develop universal service.
- promote the investment of capital in the development of telecommunications infrastructure.
- give access to telecommunications services that are reasonably comparable to those provided in urban areas to consumers throughout the island, including low-income persons and those who reside in rural areas or in areas where access to such services is costly.
- guarantee the enjoyment of the service offered, without fear of unreasonable interruptions or interference.<sup>5</sup>

The Puerto Rico General Assembly has also specifically mandated that the Board ensure that there are competitive safeguards in the provisioning of telecommunications services in Puerto Rico.<sup>6</sup> Since its creation, the Board has undertaken major initiatives to discharge its statutory mandate; has presided over many interconnection arbitrations and approved interconnection agreements; has conducted a major proceeding on reducing intrastate access rates; has consistently advocated on behalf of the telecommunications consumers of Puerto Rico and has conducted multiple proceedings related to the protection of a competitive environment in Puerto Rico.

The Board's authority to act for the benefit of the consumers of Puerto Rico has been confirmed by numerous courts.<sup>7</sup> During its 15-year history, the Board has overseen and managed a transition from a telecommunications market dominated by a government-owned monopoly to a market characterized by competition and increasing sensitivity to the right of consumers to expect consistent high-quality service. Since the creation of the Board, the incumbent carrier in Puerto Rico, Puerto Rico Telephone Company, Inc. ("PRTC"), once a government-owned carrier, has been privatized. Since privatization, progress has been made on improving the quality of service.

In addition to acting at the Commonwealth level, the Board has repeatedly acted to protect the residents of Puerto Rico by participating in proceedings at the Commission. For example, in WT Docket No. 06-113, it submitted comments on the proposed transfer of PRTC to America Movil, asking the Commission to make sure that America Movil's commitment to invest in Puerto Rico was real,

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<sup>4</sup> 27 L.P.R.A. § 265 *et seq.* ("Law 213").

<sup>5</sup> 27 L.P.R.A. § 265.

<sup>6</sup> 27 L.P.R.A. § 269c.

<sup>7</sup> See, e.g., *Centennial Puerto Rico License Corp. v. Telecommunications Reg. Bd. of P.R.*, 634 F.3d 17 (1st Cir. 2011) (confirming that the Board has authority to adopt penalty provisions to incent improved service and to take steps that require a carrier from acting anti-competitively); *WorldNet Telecommunications, Inc. v. Puerto Rico Tel. Co.*, 497 F.3d 1 (1st Cir. 2007) (upholding Board's authority to impose measures to improve overall performance); *Puerto Rico Tele. v. Telecommunications Reg. Bd.*, 189 F.3d 1, 7 (1st Cir. 1999) (confirming the Board's authority to act for the benefit of consumers in Puerto Rico).

quantifiable and verifiable.<sup>8</sup> The Commission thereafter approved the transfer, but required that America Movil invest \$1 billion over five years to improve service in Puerto Rico.<sup>9</sup> The Commission also required America Movil to provide “a written report to the Commission on an annual basis describing the progress it has made in deploying infrastructure used to provide basic telephone and broadband services in Puerto Rico. This report, which shall include quantifiable and verifiable data, shall be due to the Commission on December 31 of each calendar year.” *Id.*

The Board has also submitted comments in the Commission’s docket examining whether Puerto Rico warranted an insular mechanism<sup>10</sup> and in other dockets, urging the Commission to act for the protection of the residents of Puerto Rico.<sup>11</sup>

## **II. THE PROPOSED AT&T/T-MOBILE MERGER WILL HARM COMPETITION IN PUERTO RICO**

According to the Commission’s Public Notice,<sup>12</sup> the proposed transaction will include the transfer of the following licenses held by T-Mobile or its subsidiaries in Puerto Rico:

<u>Licensee</u>	<u>Lead Call Sign</u>
SunCom Wireless License Company, LLC	KNKN557
T-Mobile Puerto Rico LLC	KNLF249

The proposed transaction also seeks consent to transfer the following international section 214 authorization held by T-Mobile USA and certain of its subsidiaries:

<u>Authorization Holder</u>	<u>Authorization Number</u>
T-Mobile Puerto Rico LLC	ITC-214-20070626-00246

As other state commissions have noted, while the past decade has seen significant consolidation in the wireless telecommunications industry, the proposed merger would: (a) eliminate an important competitor from the marketplace; and (b) likely lead to further consolidation. *See, e.g.,* Comments of the California Public Utilities Commission and the People of the State of California, filed June 20, 2011, at 4

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<sup>8</sup> See July 14, 2006 Petition to Deny.

<sup>9</sup> *Application for Authority to Transfer Control of Telecomunicaciones de Puerto Rico, Inc.*, 22 FCC Rcd 6195 (2007).

<sup>10</sup> See October, 9, 2008 letter, May 26, 2006 Reply Comments, April 15, 2005 letter in Federal-State Joint Board on Universal Service, High Cost Universal Service Support (CC Docket No. 96-45 and WC Docket No. 05-337).

<sup>11</sup> See June 4, 2008 letter in CC Docket No. 97-80 (urging the Commission to grant the requested waiver of Choice Cable TV for the benefit of the consumers in southwestern Puerto Rico); March 19, 2007 Comments in CS Docket No. 97-80 (urging the Commission to grant a § 76.1204(a)(1) for the benefit of Puerto Rico consumers).

<sup>12</sup> FCC Public Notice DA 11-799, “AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and its Subsidiaries to AT&T Inc.,” WT Docket No. 11-65 (rel. April 28, 2011).



("from 2002 to 2010, the wireless telecommunications industry has consolidated from seven national wireless carriers to four. If the proposed merger of AT&T and T-Mobile were approved, only three national wireless carriers would remain"); Reply of the State of New York Department of Public Service, dated June 20, 2011, at 6 ("in many wireless markets, the merger will reduce the number of competitors to three"). *See also* Petition to Deny of the New Jersey Division of Rate Counsel, filed May 31, 2011, at ii ("The proposed merger would eliminate an actual and potential competitor that serves relevant wireless markets throughout the United States [and] lead to excessive and harmful market concentration in wireless markets . . .").

The situation is more serious in Puerto Rico. As of May 2011, Claro, the wireless arm of PRTC, which is owned by America Movil, had approximately [REDACTED] of the Puerto Rico wireless market.<sup>13</sup> AT&T, following its 2009 acquisition of Centennial, had [REDACTED] of the market, while T-Mobile had [REDACTED] of the market.<sup>14</sup> Thus, if the AT&T/T-Mobile merger is approved without any divestures, the combined company will control [REDACTED] of the Puerto Rico wireless market, and two companies (the combined AT&T/T-Mobile and Claro) will control [REDACTED] of the wireless market.<sup>15</sup>

The April 21, 2011 Description of Transaction, Public Interest Showing and Related Demonstrations claimed that, "[p]ost-merger, the combined company will continue to face intense competition from" Verizon Wireless, Sprint, Cricket, US Cellular, Clearwire and Lightsquared. However, save Sprint, which has approximately five percent of the Puerto Rico wireless market, the remaining alleged "competitors" have no meaningful share of the Puerto Rico market.<sup>16</sup>

The Commission has previously held that "in any market in which the transaction would reduce the number of genuine competitors to three or fewer, the proposed transaction may result in a significant likelihood of successful unilateral effects and/or coordinated interaction."<sup>17</sup> The Board agrees with this statement. Indeed, the Commission's fear about the potential for "successful unilateral effects and/or coordinated interaction" is not theoretical, but real, in Puerto Rico.

In October 2010, the Commission adopted a Consent Decree terminating an investigation by the Enforcement Bureau into PRTC's and America Movil's actions in a Commission auction.<sup>18</sup> In that Consent Decree, the parties acknowledged that there was "substantial" ownership overlap between AT&T and America Movil:

AT&T owns a substantial number (23.6 percent, based on beneficial ownership reports filed by AT&T Inc. with the Securities and Exchange Commission on August 2, 2010) of voting shares in America Movil. In

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<sup>13</sup> Mercado Lineas Celulares, Mayo de 2011, Total De Celulares: 3,025,419 (Exhibit A).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See* Exhibit A.

<sup>17</sup> *In Re Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation*, WT Docket No. 07-208, FCC 08-181, Memorandum Opinion and Order and Declaratory Ruling, at ¶ 78 (rel. Aug. 1, 2008).

<sup>18</sup> *In the Matter of Puerto Rico Telephone Company, Inc.*, File No. EB-09-1H-0023, Order, released October 14, 2010.

addition, at all relevant times, two AT&T executives sat on America Movil's Board of Directors.<sup>19</sup>

The Consent Decree explained that, after an auction for licenses in the 700 MHz Band was complete, AT&T informed the Commission that it had located minutes of an America Movil Board meeting in the files of four AT&T employees, and that the minutes "contained information revealing the amount PRTC was authorized to bid for 700 MHz licenses in Puerto Rico."<sup>20</sup> After an investigation by the Commission, PRTC and America Movil agreed to implement a compliance program and an \$80,000 payment to the United States Treasury.<sup>21</sup>

As the Description of Transaction, Public Interest Showing and Related Demonstrations acknowledges, "[i]n reviewing license-transfer applications, the Commission first assesses whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, the Commission's rules, and federal communications policy."<sup>22</sup> Pursuant to sections 214(a), 310(b)(4) and 310(d) of the Communications Act, the Commission must determine whether the proposed transaction would serve the public interest, convenience and necessity.<sup>23</sup> The Commission has indicated that it has a "deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest."<sup>24</sup> Thus, AT&T must "show by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest."<sup>25</sup>

The Board urges the Commission, together with the Department of Justice, to focus its investigation on these issues; to perform a thorough, market-specific review of the effect of the proposed merger on competition in Puerto Rico; and, if necessary, to order conditions, including, potentially, divestiture of licenses, as a condition of approving the transaction, so that it does not adversely affect competition in the Puerto Rico wireless market.<sup>26</sup> The Commission and the Department of Justice must

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<sup>19</sup> *In the Matter of Puerto Rico Telephone Company, Inc.*, File No. EB-09-1H-0023, Consent Decree, adopted October 14, 2010, at ¶ 3.

<sup>20</sup> *Id.* at ¶ 6.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 17 (citing 47 U.S.C. § 310(d)).

<sup>23</sup> 47 U.S.C. § 310(d) ("No license . . . shall be transferred . . . except upon finding by the Commission that the public interest, convenience, and necessity will be served thereby"); See also *In the Matter of Application of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling (rel. Nov. 10, 2008).

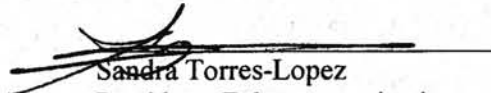
<sup>24</sup> *Id.* at ¶ 27.

<sup>25</sup> Acquisition of T-Mobile USA, Inc. by AT&T Inc., *Description of Transaction, Public Interest Showing and Related Demonstrations*, filed April 21, 2011, at 17 (citations omitted).

<sup>26</sup> *In re AT&T Inc.*, 25 FCC Rcd 8704, at ¶ 25 (2010) (holding that the Commission has the statutory authority to "impose and enforce conditions to ensure that the transaction will yield overall public interest benefits" and citing 47 U.S.C. §§ 214(c), 303(r)).

also ensure that the transaction will not adversely impact consumers by requiring them to transition into AT&T's higher plans.<sup>27</sup> Of course, the Board and the Puerto Rico Department of Justice reserve the right to conduct their own inquiry into the proposed merger.

Very truly yours,



Sandra Torres-Lopez  
President, Telecommunications  
Regulatory Board of Puerto Rico

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<sup>27</sup> The Board urges the Commission to consider imposing, as a condition to the transaction, that all existing T-Mobile customers be allowed to retain their current plan, at the current rates, until expiration.